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No. 136

In the Supreme Court of the United States

OCTOBER TERM, 1951

JAMES W. BUTTERFIELD, DIRECTOR OF IMMIGRATION AND NATURALIZATION SERVICE, DETROIT, MICHIGAN, PETITIONER

v.

JOHN ZYDOK

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

REPLY MEMORANDUM FOR THE PETITIONER

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The respondent has raised certain points which are not treated in petitioner's main brief. These points are entirely collateral to the main issues involved in this and the *Carlson* case and were not relied on by the court below.

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I

THE FACT THAT THE RESPONDENT HAD BEEN RELEASED ON BOND DID NOT BAR HIS REARREST AND SUBSEQUENT DETENTION WITHOUT BOND

The respondent argues that the Attorney General, having released him on $2,000 bond, had exhausted his power under the original warrant and had no authority under the statute to rearrest and detain him thereafter. He draws an analogy to certain criminal cases in which an arresting officer has been held to have exhausted an arrest warrant by exercising it (Br. 4–5). This argument misconceives the nature of a warrant in the immigration procedures.

An examination of the warrant makes it clear that the document is in the nature of a pleading as well as an authority to arrest (R. 4–5). It is in fact the complaint in the proceeding and continues in effect throughout the proceedings. This dual nature of the document has been recognized by the courts. *United States* v. *Karnuth*, 108 F. 2d 178 (C. A. 2).[1] Thus it is obvious that the effect of the original warrant is not exhausted by taking the alien into custody.

The second arrest of the alien in this case was made pursuant to the order of the same Assistant Commissioner, Enforcement Division, of the

[1] This Court has recognized the right to continue an alien in custody under the original warrant even after a deportation order has been held invalid. *Wong Yang Sung* v. *McGrath*, 339 U. S. 908.

Immigration and Naturalization Service, who issued the original warrant (R. 17). Thus, if further authority to the District Director was required in order to rearrest the respondent, it was provided by this direction which is in effect a telegraphic warrant of arrest.

To argue that there was no power to rearrest is in effect to argue that the Attorney General had no authority to revoke bail once it had been granted. Yet, as the respondent's own brief points out, the release of an alien on bail is merely a modified form of detention, transferring the custody to the surety (Br. p. 5, fn. 2). Therefore, there was no surrender of jurisdiction over the person of the alien, and the rearrest merely constituted a further modification of that custody. To read the language of the statute, which provides that an alien may "be continued in custody," as denying authority to the Attorney General to modify or revoke an order releasing an alien on bail, is wholly inconsistent with the purposes of the statute. The only question was whether such action was an abuse of discretion, the issue which we discuss at length in our main brief.

II

RESPONDENT'S COMMUNIST ACTIVITY WAS SUFFICIENTLY SUBSTANTIATED IN THESE PROCEEDINGS

(a) The respondent's attack on the procedures followed in the preliminary investigation of May

25, 1949 (Br. 2–3), at which time respondent admitted his Communist record, is gratuitous since in a subsequent hearing which respondent does not attack, the same admissions were made (R. 80, 81, 82, 87, 88). However, lest the Court be misled into assuming from our silence that the statements made on pages 2 and 3 and in footnote 1 of respondent's brief are admitted, it is denied that there were any irregularities in the May 25, 1949, investigation. The respondent was not arrested but merely questioned and he was informed that his answers must be voluntary (Ex. 5, p. 1). Although no counsel was present, since the matter was in the preliminary stage of inquiry, it is the practice of the Immigration Service to permit counsel to be present at such investigations if the alien requests it. The alien was informed that any answers he made could be used against him (Ex. 5, p. 1). The statements, in respondent's brief, that the respondent was forced to sign an admission that he had been a Communist in order to obtain his release are in error or are immaterial to this case since the only statement here involved is the investigation which appears in this record as Exhibit 5, and which was *not* signed by the alien (Ex. 5, p. 37).

(b) The respondent attacks the district court's finding, that the petitioner was a Communist, on the ground that it was improperly deduced from the alien's claim of privilege against self-incrimination. This has reference to the court's find-

ing (No. 16) that the alien was "evasive" (R. 12). But the court's comment on the "evasive demeanor" of the witness obviously relates not to his claim of privilege but to his repeated statements that he could not remember, when he was asked concerning his prior testimony (R. 42–67). The court of appeals, which recognized his right to claim the privilege, stated, "It is undeniably true that appellant was, before his original arrest, a member of the Communist Party and was financial secretary of the Hamtramck Division of the Communist Party of Michigan for the year 1949 * * * ."

CONCLUSION

It is respectfully submitted on the basis of the foregoing that the judgment of the court below should be reversed.

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